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No. 88-

UNITED STATES SUPREME COURT

October Term 1988

CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL NO. 391,

Petitioner,

v.

THOMAS C. TERRY, et al.,

Respondents.

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

J. DAVID JAMES
(Counsel of Record)
Smith, Patterson, Follin,
Curtis, James & Harkavy
101 South Elm Street
P.O. Drawer Y
Greensboro, NC 27402
919/274-2992

WALTER KAMIAT
LAURENCE GOLD
815 16th Street
Washington, DC 20006
(202) 637-5390

Counsel for Petitioner

8-1988

## QUESTION PRESENTED

Is there a right to a jury trial in an action by employees against their union alleging that the union breached its duty of fair representation -- a duty which has been implied from § 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a)-- whenever the employees seek monetary compensation in any form (e.g., back pay) as a part of their request for relief?

## PARTIES

The parties to this proceeding are petitioner, Chauffeurs, Teamsters and Helpers Local Union No. 391, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Helpers and Warehousemen of America, AFL-CIO, and respondents Thomas C. Terry, Dan Fields, Jim Crowe, Keith Barker, James A. Richards, Don Wright, David L. Giltz, Dale Bishop, Tony, Baity, James R. Davis, Don Britt, Lonnie Davis, Jim Wilson, David C. King, Donald E. Henderson, Arthur Jarrell, Ron Ray, J. C. Greer, Gary Peebles, Harold Dyson, Ed Strange, Sam E. Callahan, George C. Blankenship, Jr., Paul Embry, Clayton Worley, John R. Marshall, and Robert C. Munsey.



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NO. 88-

UNITED STATES SUPREME COURT

October Term 1988

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| CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL NO. 391, | ) |
| Petitioner, | ) |
| v. | ) |
| THOMAS C. TERRY, et al., | ) |
| Respondents. | ) |

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petitioner, Chauffeurs, Teamsters and Helpers Local Union No. 391, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Helpers and Warehousemen of America, AFL-CIO (hereinafter "Local 391"), respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit in Terry, et al. v. Chauffeurs, Teamsters and Helpers Local No. 391, 4th Cir. No. 87-3896 (December 10, 1988).

## OPINIONS BELOW

The decision of the United States Court of Appeals for the Fourth Circuit is reported at 863 F.2d 334 (1988), and is reprinted at pp. 30-52 of the Appendix. The Memorandum Opinion of the United States District Court for the Middle District of North Carolina denying petitioner's motion to strike the respondents' jury trial demand is reported at 676 F.Supp. 659 (1987) and is reprinted at pp. 1-30 of the Appendix. The decision of the Court of Appeals granting Local 391's petition for an interlocutory appeal is reprinted at p. 30 of the Appendix.

## JURISDICTION

The judgment of the Court of Appeals

was entered on December 20, 1988. On March 10, 1989, Local 391 applied for an extension of time to file this Petition for Writ of Certiorari. That application was granted on March 14, 1989 by order of the Chief Justice extending the time for filing this Petition to and including April 19, 1989. This petition is being filed within that extended time period. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution provides as follows:

> In [s]uits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law.

The duty of fair representation claim is implied from § 9(a) of the National Labor



Relations Act, 29 U.S.C. § 159(a), which provides:

> (a) Representatives designated or selected for purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representative of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect: Provided, further, That the bargaining representative has been given the opportunity to be present at such adjustment.

## STATEMENT OF THE CASE

1. On July 25, 1983 the respondents commenced this action in the District Court against Local 391, their employer, McLean Trucking Company (hereinafter "McLean") and the International Brotherhood of Teamsters,

Chauffeurs, Warehousemen and Helpers of America (hereinafter the "International"). The facts, as alleged in the complaint and as recounted in the opinion of the Court of Appeals, are as follows.

Respondents were all drivers who were employed by McLean and who lived in locations other than Winston-Salem, North Carolina. Because of a change of operations, the terminals near plaintiffs' homes were closed and they bid and were transferred to McLean's Winston-Salem terminal. After they transferred to the Winston-Salem terminal, they were laid off and recalled on several occasions. McLean and Petitioner were parties to a collective bargaining agreement. Respondents contend that McLean had breached the agreement by manipulating recall procedures so as to give other drivers preference over them and that Local 391 failed to fairly represent



them in the resulting grievances. See Appendix at 33-34; 863 F.2d at 335.[1]

The first set of grievances filed by respondents were pursued by Local 391 in arbitration, and, as a result, McLean was ordered to adjust its layoff policy to comply with previous agreements between McLean and Local 391. In a subsequent set of grievances, however, respondents contended that McLean then engaged in a pattern of layoff and recall activity in order to circumvent the prior arbitration award. Appendix at 34; 863 F.2d at 335.

Local 391 pursued respondents' second set of grievances to arbitration, as well.

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[1]Although the Complaint named the International as a defendant, the District Court granted the International's motion for summary judgment. Appendix at 32, n.1, 863 F.2d at 335 n.1. Similarly, although the Complaint named McLean as a defendant, McLean has since filed a petition in bankruptcy, and the action against McLean was stayed. Id. Respondents eventually filed a voluntary dismissal as to McLean.

But the grievances were denied. Appendix at 34; 863 F.2d at 336. Local 391 declined to take a third set of grievances to arbitration because all of the issues had been decided in the first and second arbitration awards.

2. In their complaint, respondents contended that because of the asserted breach of the duty of fair representation, the arbitration awards should not be final and binding but should be set aside. The complaint also sought declaratory and injunctive relief, compensatory damages for lost wages and benefits, attorney's fees and costs, reinstatement, punitive damages and damages for mental and emotional distress. By Order dated January 9, 1989, the District Court struck the respondents' claim for punitive damages for mental and emotional distress.

On January 6, 1986, Local 391 filed



its Motion to Strike Plaintiffs' Jury Trial Demand. Although the District Court denied the Motion (Appendix at 1; 676 F.Supp. 659), in an order dated November 10, 1987 it certified the jury trial issue for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). On November 19, 1987, Local 391 petitioned the Court of Appeals for permission to appeal pursuant to 28 U.S.C. § 1292(b), and that petition was granted by order of the Fourth Circuit dated December 17, 1987. By opinion entered on December 20, 1988 (Appendix at 31; 863 F.2d 336), the United States Court of Appeals for the Fourth Circuit affirmed the District Court's order.

## REASONS FOR GRANTING THE WRIT

### I. Because a Clear Conflict Exists Among The Courts of Appeals, Certiorari Should Be Granted To Resolve Whether Plaintiffs Have a Right To a Jury Trial In Duty of Fair Representation Suits Against Unions Whenever Back Pay Is Sought.

This case presents a recurring issue in a particularly active area of the federal labor law that has created substantial uncertainty in the lower courts, including a clear conflict among the circuits: Does the Seventh Amendment's preservation of jury trial rights "in [s]uits at common law" guarantee a jury trial when an employee brings an action against his or her union alleging that the union has breached the duty of fair representation (the "DFR") -- as derived by implication from § 9(a) of the National Labor Relations Act (hereinafter "NLRA"), 29 U.S.C. § 159(a) -- and seeks some form of monetary compensation (e.g., back pay) from the union as one element of relief.

A. The Fourth Circuit -- in holding that there is a jury trial right in such cases -- recognized that the United States Court of Appeals for the District of



Columbia Circuit and the United States Court of Appeals for the Eleventh Circuit had come to contrary conclusions on this issue, and the Fourth Circuit aligned itself with the D.C. Circuit. See Appendix at 45; 863 F.2d at 338 (contrasting Quinn v. DiGiulian, 739 F.2d 637 (D.C. Cir. 1984) (holding that plaintiffs in DFR suits are entitled to jury trial if seeking back pay) with Leach v. Pan American Worlds Airways, 842 F.2d 285 (11th Cir. 1988) (holding that plaintiffs in DFR suits have no right to jury trial).[2]

Moreover, subsequent to the decision below, the Sixth Circuit rejected the claim

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[2]Although the Leach decision involved an action for breach of the duty of fair representation under the Railway Labor Act, 45 U.S.C. §§ 151-188, rather than the NLRA, the Court of Appeals in that case correctly noted that the same rules would apply to actions under the NLRA. 842 F.2d at 287 n.2 (for purposes of fair representation suits courts have refused to distinguish the two acts) (citing Ford Motor Co. v. Huffman, 345 U.S. 330 (1953)).

of DFR plaintiffs to a jury trial right. See Deringer v. Columbia Transportation Div., Slip Op. No. 87-3392 (6th Cir. January 30, 1989) (holding that there is no right to jury trial in duty of fair representation suit where no explicit demand for monetary damages was made against a union, and noting that a demand for lost wages would be considered demand for equitable, not legal relief); see also Wood v. International Brotherhood of Teamsters, 807 F.2d 493, 504 (6th Cir. 1986) (Contie, J. concurring) (arguing against jury trial right in duty of fair representation suit); id. at 504 n.3 (in an opinion that does not reach issue, majority nevertheless notes in dicta its general agreement with position of concurrence).

Thus, at this time, four of the Courts of Appeals have considered the question presented here and have divided evenly as



to its proper resolution.[3]

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[3]Although two courts of appeals decisions prior to Quinn v. DiGiulian, supra, had held that DFR plaintiffs, at least in some circumstances, have a right to a jury trial, see Cox v. H. Masland & Sons, Inc., 607 F.2d 138 (5th Cir. 1979) (jury trial right where no equitable relief is sought); Minnis v. International Union, UAW, 531 F.2d 850 (8th Cir. 1975) (same), it is doubtful that those decisions will be viewed as commanding any binding precedential force.

Both decisions based their conclucions on the theory that DFR actions are closely analogous to common law contract or tort actions, and this Court has subsequently rejected precisely those analogies in a related context. See DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151, 165 (1983) (refusing to analogize duty of fair representation action to common law contract or tort actions for purposes of determining proper statute of limitations and stating that a duty of fair representation action "has no close analogy under ordinary state law"); United Parcel Service v. Mitchell, 451 U.S. 56, 62 n.4 & 63 (1981) (rejecting analogy of duty of fair representation claims to common law tort or contract claims and noting unique history of duty of fair representation as "creature of labor law").

Based on DelCostello and Mitchell, the Eleventh Circuit expressly rejected the continued precedential value of Cox, see Leach v. Pan American, supra, 842 F.2d at 286-286, even though decisions from the

B. The conflict in the circuits is not a mere fortuity; rather, it is the product of the recurrence of the jury trial issue in the many fair representation cases brought in the federal courts and reflects the difficulty the trial courts have had in resolving the issue. Our survey of the opinions on this issue in those district courts outside of the Fourth, Sixth, Eleventh and D.C. Circuits (viz. outside the circuits which have already ruled on the question) shows the recurrent nature of this issue, and the chaotic pattern of

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"old Fifth Circuit" are normally binding precedent in the Eleventh Circuit. See Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc). And the issue of the continued precedential value of Minnis is currently presented to the Eighth Circuit in Brownlee v. Yellow Freight System, 88-2663-EM & 88-2664-EM. See also Spicher v. Wilson Foods Corp., 122 LRRM 3168, 3170 (C.D. Ill. 1985) (pre-Mitchell cases holding that there is right to jury trial have no persuasive authority since they rest on rejected contract and tort analogies).



decisions the issue has generated. See, e.g., Pappas v. Jewel Co. Inc., 126 LRRM 3103 (N.D. Ill. 1987) (right to jury trial); Woods v. Dunlop Tire Co., 673 F.Supp. 117 (W.D.N.Y. 1987) (right to jury trial); Spicher v. Wilson Foods Corp., 122 LRRM 3168 (C.D. Ill. 1985) (no right to jury trial); Cook v. National Maritime Union, 617 F.Supp. 1052 (S.D.N.Y. 1985) (right to jury trial); James v. Universal Manufacturing Co., 109 LRRM 2858 (S.D. Miss. 1981) (no right to jury trial); Shanley v. U.P.S., 101 LRRM 2190 (E.D.N.Y. 1979) (no right to jury trial); Harrison v. Chrysler Corp., 60 F.R.D. 9 (S.D. Ind. 1973) (no right to jury trial); Brady v. Trans World Airlines, 196 F.Supp. 504 (D. Del. 1961) (no right to jury trial), aff'd on other grounds, 402 F.2d 87 (3d Cir. 1968), cert. denied, 393 U.S. 1048 (1969).

Against this background, and because

this case presents a clear opportunity for the Court to resolve this issue, certiorari should be granted. Further litigation in the lower courts cannot resolve this issue, but will only deepen the conflict and risk the inconsistency of results in an area of the law where Congress and this Court have declared uniformity a prime virtue.

## II. The Well-Established Method of Analysis of This Court In The Area of Seventh Amendment and Duty of Fair Representation Law Leads to The Conclusion That Duty of Fair Representation Plaintiffs Do Not Have a Right To a Jury Trial.

A right to a jury trial can stem either from statute or from the Seventh Amendment itself. As we now show, neither source supports a demand for a trial by jury in a fair representation case. Thus, the decision below is not only in conflict with other Court of Appeals decisions, that decision is on the wrong side of the conflict.



A. The threshold question whenever a jury trial is sought with respect to a federal statutory cause of action is whether Congress has created such a right. Tull v. United States, 481 U.S. 412, 417, n.3 (1987). Here, the cause of action has been "judicially implied from the [NLRA and Railway Labor Act] and the policy [of exclusive representation] which [those acts] adopted." Electrical Workers v. Foust, 442 U.S. 42, 47 (1979), quoting Steele v. Louisville & Nashville R. Co., 323 U.S. 192, 204 (1944). Since the NLRA does not even mention a duty of fair representation or explicitly provide any cause of action for breach thereof, that statute does not, in terms, create a jury trial right for fair representation claims. Indeed, the fair representation cause of action "had not yet [been] divined" when Congress passed the NLRA in 1935, United

Parcel Service v. Mitchell, supra, 451 U.S. at 76.

In enacting the NLRA, however, Congress did consider whether to authorize jury trials as the method of adjudicating the unfair labor practice actions created by the Act, and Congress specifically declined to authorize trials by jury. NLRB v.Jones & Laughlin Steel Corp., 301 U.S. 1, 48 (1937). And, in DelCostello v. Teamsters, supra, 462 U.S. at 170, the Court recognized the "substantial overlap" and "family resemblance" between the fair representation cause of action and the unfair labor practice cause of action. Given this similarity, the fair inference of Congress's actions in 1935 is clear: because Congress did not intend that unfair labor practices under the NLRA be tried to juries, it follows that Congress would not have intended juries to try closely



analogous actions derived by implication from the NLRA.

B. The issue in this case thus reduces to whether in the absence of any Congressional intent to provide such a right, the Seventh Amendment itself requires a jury trial for fair representation cases.

The Seventh Amendment, which provides that "[i]n [s]uits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved," has been held to preserve "the right which existed under the English common law when the Amendment was adopted." Baltimore and Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935). Application of the Amendment to statutory causes of action thus turns on "whether [the] action is more similar to cases that were tried in courts of law [or] to suits tried in courts of

equity or admiralty." Tull v. United States, supra, 481 U.S. at 417. That comparison is made through a two-pronged examination, focusing on the nature both "of the action and of the remedy sought," id. at 417:

> [T]he Court must examine both the nature of the action and of the remedy sought. First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature. [Id. at 417-418 (internal citations omitted).][4]

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[4]The Court had previously stated the proper examination as a three-prong test, adding as the third prong an inquiry into "the practical limitations of a jury trial and its functional compatibility with" the action in question. Tull v. United States, supra, 481 U.S. at 418 n.4. See, e.g., Ross v. Bernhard, 396 U.S. 531, 538 n.10 (1970) (stating three-prong test). In Tull, however, the Court made clear that this third prong served only as a limit on the right to a jury trial, and could not serve as "an



As we now show, applying this two-prong approach to the instant issue leads to the conclusion DFR plaintiffs do not have a jury trial right.

First, a comparison of an action for breach of the duty of fair representation to "18th-century actions brought in the courts of England," 481 U.S. at 417, reveals, of course, that nothing like the fair representation duty was known to traditional common law; the DFR is a "creature of labor law." United Parcel Service v. Mitchell, supra, 451 U.S. at 63. Indeed, as we have noted, this Court has explicitly refused to analogize a suit for breach of the duty of fair representation to traditional common law tort or contract actions, finding instead that such a suit

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independent basis for extending the right to a jury trial under the Seventh Amendment." 481 U.S. at 418 n.4.

is a vital part of the overall federal labor law scheme and "has no close analogy in ordinary state law." DelCostello v. Teamsters, 462 U.S. at 165.

Although not closely analogous to any traditional cause of action, the duty of fair representation does rest on the traditions of equity. In particular, that duty rests on the equitable principles relating to a fiduciary's responsibilities to those on whose behalf he is charged to act. As this Court explained in Steele v. Louisville & N.R. Co., 323 U.S. 192 (1944) -- the case which first recognized the fair representation duty -- the duty is an instance of the "principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf." Id. at 202. At the time when the



Seventh Amendment was adopted the enforcement of such a fiduciary duty was, of course, well within traditional equity jurisdiction. Then, as now, actions to enforce such a duty were tried without a jury. See generally 4 Scott on Trusts §§ 197 & 281 (3d ed. 1967).

Second, an evaluation of the remedies sought in duty of fair representation suits bolsters the conclusion that the suit is predominantly equitable. This Court has made clear that a court exercises a wide discretion in crafting the remedy to be awarded in a fair representation suit. In Vaca v. Sipes, 386 U.S. 171 (1967), the Court noted that "[t]he appropriate remedy for a breach of a union's duty of fair representation must vary with the circumstances of the particular breach," id. at 195, and that "an order compelling arbitration should be viewed as one of the

available remedies when a breach of the union's duty is proved." Id. at 196. A duty of fair representation suit is thus far from the traditional legal action where damages are awarded as of right. Cf. Curtis v. Loether, 415 U.S. 189, 196-197 (1974). Instead, such a suit is "equitable" in character since the court retains the authority to award equitable relief (such as an order of arbitration) if, under the circumstances of a particular case, the court deems such relief more appropriate than monetary relief. Choosing between monetary and injunctive relief was, of course, not an available option in a pre-merger common law court, and it is not an option within the normal powers of a jury.

Moreover, in many DFR cases, including the present one, the plaintiffs are entitled to no relief unless an underlying arbitration



award -- which would otherwise be final and binding -- is set aside. And vacating an arbitration award is a purely equitable form of relief. (Thus in this case, plaintiffs' request for monetary relief (or any other relief) is intimately intertwined with -- indeed wholly dependent upon -- the equitable relief of setting aside the arbitration award adverse to them.)

While injunctive relief was not available in a pre-merger legal action, monetary relief was available in equity. Availability of monetary relief is thus wholly consistent with equity. Federal law has long reflected this, recognizing that a remedial scheme modeled on equity may award back pay -- even as the presumptive remedial option -- and yet not lose its equitable character. See Albemarle Paper Co. v. Moody, 422 U.S. 405, 413-425 (1975) (Title VII remedy provisions are modeled on

NLRA remedies, NLRA remedies are equitable in nature, and equitable nature of Title VII action is wholly consistent with policy that courts should normally exercise their discretion to award full make-whole relief, including back pay); id. at 441-447 (Rehnquist, J. concurring). Indeed, the NLRA -- from which the duty of fair representation is derived -- is a clear example of such a scheme: the Act provides no right to a jury trial; back pay has been awarded as a matter of course under NLRA practice. Id. at 419-420 (discussing NLRA back pay practice as example of equitable scheme involving routine use of back pay, and noting that this was model for remedial scheme of other statutes).

Against this background, those circuits that have found a jury trial right in duty of fair representation cases on the ground that monetary awards of back pay are



available, see Appendix at 49-50; 863 F.2d at 339; see also Quinn v. DiGiulian, supra, 739 F.2d at 642, have taken an approach that cannot be squared with the law of this Court.

C. The sum of the matter is this: those courts that have held that there is no right to a jury trial in a duty of fair representation case have taken a position that is entirely consistent with the decisions of this Court. In contrast, the position of the court below, and those other courts that have held duty of fair representation plaintiffs to be entitled to juries whenever they seek back pay, is inconsistent with this Court's precedents.

From its genesis in concerns over fiduciary responsibility to its modern characterization by this Court as analogous to an unfair labor practice, the fair representation claim is an equitable claim,

quite unlike any action at common law. To correct those courts that have erred on this important issue of federal labor law, and to bring clarity to an area of continuing importance to the federal courts, this Court should grant this petition for a writ of certiorari.

## CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

J. DAVID JAMES
(Counsel of Record)
Smith, Patterson, Follin,
Curtis, James & Harkavy
101 South Elm Street
P.O. Drawer Y
Greensboro, NC 27402
919/274-2992

WALTER KAMIAT
LAURENCE GOLD
815 16th Street, N.W.
Washington, DC 20006
(202) 637-5390

Counsel for Petitioner



## APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

Civil No. C-83-693-WS
[FILED November 10, 1987]

THOMAS C. TERRY, DAN FIELDS, JIM CROWE, KEITH BARKER, JAMES A. RICHARDS, DON WRIGHT DAVID L. GILTZ, DALE BISHOP, TONY BAITY, JAMES R. DAVIS, DON BRITT, LONNIE DAVIS, JIM WILSON, DAVID C. KING, DONALD E. HENDERSON, ARTHUR JARRELL, RON RAY, J. C. GREER GARY PEEBLES, HAROLD DYSON, ED STRANGE, SAM E. CALLAHAN, GEORGE C. BLANKENSHIP, JR., PAUL EMBRY, CLAYTON WORLEY, JOHN R. MARSHAL, AND ROBERT C. MUNSEY,

Plaintiffs,

v.

CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL 391; and McLEAN TRUCKING COMPANY, INC.,

Defendants.

## MEMORANDUM OPINION

BULLOCK, District Judge

Plaintiffs, present and former members of Local 391, International Brotherhood of Chauffeurs, Teamsters, Warehousemen and Helpers of America, and former employees of McLean Trucking Company, Inc., have brought this action pursuant to Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, alleging breach of the collective bargaining agreement against McLean Trucking Company and breach of the duty of fair representation against the International Brotherhood of Teamsters of America and Local 391. Plaintiffs also allege that all Defendants were involved in a conspiracy to violate Plaintiffs' rights under the collective bargaining agreement. Plaintiffs seek declaratory and injunctive relief, compensatory damages, attorney's fees, and costs. Plaintiffs also demand a jury trial.



The court granted summary judgment in favor of the International Brotherhood of Teamsters of America, and this proceeding was stayed with respect to McLean Trucking Company upon McLean's filing of a petition in bankruptcy. Presently pending before the court is a motion to strike the Plaintiffs' jury demand filed by the remaining Defendant, Local 391.

The parties have submitted briefs and the court heard oral argument in conjunction with the final pre-trial conference on September 30, 1987.

This matter presents a close question concerning whether Plaintiffs are entitled to a jury trial for a Section 301/breach of duty of fair representation claim. The case law which has confronted the question directly is split, and some of the rationale for granting a jury trial may have been altered by the United States

Supreme Court's determination in United Parcel Service v. Mitchell, 451 U.S. 56 (1981), and DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983), that such suits are not analogous to common law contract or tort actions.

Few circuit courts since the Supreme Court's rulings in Mitchell and DelCostello have approached the jury issue in fair representation actions, and the one which most closely addressed the issue ruled in favor of a jury. Quinn v. DiGiulian, 739 F.2d 637 (D.C. Cir. 1984).[1] The district court cases since 1983 are sharply divided, however, with some construing the Supreme Court decisions broadly and other following the narrower construction in Quinn. For

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[1]The Ninth Circuit also recently allowed a jury to resolve the question of liability in a hybrid Section 301 action where the claimants sought back compensation for sick leave. Zuniga v. United Can Co., 812 F.2d 443 (9th Cir. 1987).



the reasons set forth below, the court finds the latter position more persuasive, and therefore denies Defendant's motion to strike Plaintiffs' jury demand.

Defendant correctly points out that Section 301 does not provide an independent statutory right to a jury trial. The very general language of Section 301 merely grants jurisdiction in federal courts. Defendant also contends, however, that Plaintiffs' Section 301 claim is not an action "at common law" within the meaning of the seventh amendment[2] and therefore Plaintiffs are not entitled to a trial by jury. In support of this contention, Defendant notes the distinction drawn by the United States Supreme Court in Mitchell and DelCostello between "hybrid" Section

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[2]The seventh amendment provides in part: "In Suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved...." U.S. Const. amend. 7.

301 claims and their common law components. In DelCostello, the Court reasoned that because the plaintiff in a Section 301/fair representation suit must demonstrate both the employer's contract violation and the union's breach of duty to prevail against either party, the two underlying claims are "inextricably interdependent." 462 U.S. at 164-65 (citing Mitchell, 451 U.S. at 66-67 [Stewart, J., concurring in judgment], quoting Hines v. Anchor Motor Freight, 424 U.S. 554, 570-71 [1976]). Consequently the hybrid cause of action is not equivalent to the standard common law contract or tort claim, but is a product of labor law which was not recognized at common law.[3] The

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. [3]Defendant contends that the weight of authority of lower court cases prior to Mitchell was against the right to a jury trial. See Nedd v. Thomas, 316 F. Supp. 74 (M.D. Pa. 1970), aff'd on other grounds, 556 F.2d 190 (3d Cir. 1977), cert. denied, United Mine Workers v. Nedd, 434 U.S. 1013 (1978); Brady v. Trans World Airlines, Inc., 196 F. Supp. 504 (D. Del. 1961),



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aff'd on other grounds, 401 F.2d 87 (3d Cir. 1968), cert. denied, 393 U.S. 1048 (1969). Defendant further argues that Mitchell and DelCostello swing the balance more in its favor by effectively overruling the prior cases which granted a jury trial. This overstates the significance of the Supreme Court rulings, however, because although the prior cases treated hybrid Section 301 claims like common law contract and tort actions they also took into account the type of remedies involved and the abilities of the jury in deciding that the seventh amendment applied. See Cox v. C. H. Masland & Sons, Inc., 607 F.2d 138 (5th Cir. 1979); Minnis v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, 531 F.2d 850, 852-53 (8th Cir. 1978); Kinzel v. Allied Supermarkets, Inc., 88 F.R.D. 360, 362-64 (E.D. Mich. 1980).

The court also notes at the outset that although the Fourth Circuit has not addressed this issue directly it has permitted a jury trial as to the damage issue in an action against a union under the Labor-Management Reporting and Disclosure Act, 29 U.S.C. Sec. 401 et seq., Simmons v. Avisco, Local 713, Textile Workers of America, 350 F.2d 1012 (1965). The Fourth Circuit also tacitly acknowledged the right to jury trial in a fair representation action against a union. Wyatt v. Interstate & Ocean Transport Co., 623 F.2d 888 (4th Cir. 1980). The court granted defendant's judgment n.o.v. and new trial motions after the jury awarded plaintiff monetary damages but the court

Supreme Court's conclusion does not preclude applicability of the seventh amendment to such actions, however. The Court has clearly stated in other decisions that the seventh amendment embraces not only those causes of action which the common law recognized, but all suits "in which legal rights were to be ascertained or determined." Ross v. Bernhard, 396 U.S. 531, 533 (1970). The question is not whether the rights existed at common law or were created by statute, for it is well established that the seventh amendment "requires a jury trial upon demand" where a statute "creates legal rights and remedies, enforceable for damages in the ordinary courts of law." Curtis v. Loether, 415 U.S. 189, 194 (1974). Rather, the question is whether the rights plaintiffs assert in

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did not question the legality or propriety of the jury trial.



their hybrid Section 301 action are legal or equitable.[4]

On this point the Supreme Court's observation in DelCostello is not dispositive. In Ross the Court mentioned three factors for determining the legal nature of an issue, and the "pre-merger custom with reference to such questions" is only the first of these. 396 U.S. at 538 n. 10. Moreover, DelCostello merely implies that the common law did not speak to hybrid Section 301 claims, and does not say that

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[4]Plaintiffs' claim asserts a right created by statute. Although the duty of fair representation is not expressly included in the federal labor laws, the Supreme Court has found it to be an implicit obligation of exclusive bargaining representatives under both the Railway Labor Act, Steele v. Louisville & Nashville R. Co., 323 U.S. 192, 202 (1944), and the National Labor Relations Act, Ford Motor Co. v. Huffman, 345 U.S. 330, 337 (1953); Humphrey v. Moore, 375 U.S. 335, 342 (1964). The Supreme Court also authorized its enforcement in the federal courts in Vaca v. Sipes, 386 U.S. 171, 188 (1957).

they are equitable.[5] Whether a claim is legal or equitable for seventh amendment purposes depends also on "the remedy sought; and . . . the practical abilities and limitations of juries," Ross, 396 U.S. at 538 n.10, and in fact the Court has previously implied that the type of remedies involved is more important than whether the cause of action had a common law counterpart. Curtis, 415 U.S. at 195-96; see also Quinn v. DiGiulian, 739 F.2d at 646; Kinzel v. Allied Supermarkets, Inc., 88 F.R.D. at 362.

In addition to requesting reinstatement and other injunctive relief Plaintiffs seek punitive damages and other monetary relief for lost wages and health benefits and for mental and emotional distress. Because McLean has ceased operation and is

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[5]Defendant's contention to the contrary will be considered shortly herein.



not presently before this court, injunctive relief in the form of reinstatement is no longer possible. The current law also indicates that Plaintiffs' punitive damage claim may not lie against Local 391, Peterson v. Air Line Pilots Assn., International, 759 F.2d 1161, 1167 (4th Cir. 1985); see also International Brotherhood of Electrical Workers v. Foust, 442 U.S. 42, 49-52 (1979) (Railway Labor Act); Local 20, Teamsters, Chauffeurs & Helpers Union v. Morton, 377 U.S. 252, 260-61 (1964) (NLRA Sec. 303[a]).

The law is not clear as to whether lost wages constitute legal or equitable relief in Section 301 claims. The Supreme Court has recognized the inappropriateness of jury trials in Title VII actions, acknowledging circuit court decisions which denied jury trials where claimants sought reinstatement and back pay. See Great

American Federal Savings and Loan Ass'n v. Novotny, 442 U.S. 366, 375 (1979) (citing Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 [5th Cir. 1969]) (treating back pay as part of the statutory equitable remedy); Lehman v. Nakshian, 453 U.S. 156, 164 (1981). This position is based in large part on the language of Title VII, 42 U.S.C. Sec. 2000e-5(g), which "expressly authorizes only equitable remedies," Novotny, 442 U.S. at 375, see also Lorillard v. Pons, 434 U.S. 575, 584 (1978), and which leaves the awarding of back pay to the equitable discretion of the trial court. Lorillard v. Pons, 434 U.S. at 584 (citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 [1975]). In order to fashion appropriate relief within the constraints of Title VII, the Court has found back pay to be a "make-whole" remedy, not outside of equity. Albemarle, 422 U.S.



at 419-21. See also Robinson v. Lorillard, 444 F.2d 791, 802 (4th Cir.), cert. dismissed, 404 U.S. 1006 (1971).

Courts have treated actions under other statutes differently, however. In Lorillard v. Pons the Supreme Court distinguished the limiting language of Title VII from the broader remedial provisions of the Age Discrimination in Employment Act ("ADEA") which expressly permit recovery of "legal or equitable" relief. 29 U.S.C. Sec. 626(b), (c). The Court further reasoned that since the ADEA also incorporates the procedural aspects of the Fair Labor Standards Act ("FLSA"), and since Congress must have known that the FLSA has been interpreted to include jury trials, by providing for legal relief Congress must have intended to extend the right to a jury to ADEA actions. Id. at 582-83.

In addition, the Court observed that although the ADEA does not specify which types of relief are legal or equitable, since "employment, reinstatement or promotion are equitable . . . 'legal relief' must refer to" "unpaid minimum wages or unpaid overtime compensation" within the meaning of the FLSA. Lorillard v. Pons, 434 U.S. at 583 n.11. Since lost wages are the ADEA equivalent of unpaid minimum wages or unpaid overtime compensation, Pons v. Lorillard, 549 F.2d 950, 953 (4th Cir. 1977), aff'd, Lorillard v. Pons, 434 U.S. 575 (1978), the Supreme Court essentially agreed with the Fourth Circuit's ruling that for ADEA purposes lost wages, e.g., back pay, is traditional legal relief.

The status of lost wages under Section 301 is not as clear. Section 301 does not mention forms of relief, other than to say



that monetary damages cannot be recovered against individual union members. 29 U.S.C. Sec. 185(b). However, although Congress did not expressly provide for legal or equitable relief, legal relief has been granted in the past in the form of punitive damages against the employer or damages resulting from the wrongful conduct. Therefore Section 301 does not limit recovery to equitable remedies.

None of the circuit courts have directly confronted the question whether lost wages are equitable or legal in actions brought under Section 301. However, two circuit courts have apparently treated them as traditional legal remedies. Cox v. C. H. Masland & Sons, Inc., 607 F.2d at 142; Minnis v. International Union, etc., 531 F.2d at 852. Each of those cases involved discharged plaintiffs, and both ruled in favor of a jury trial for

plaintiffs' hybrid Section 301 claims. Neither court specified the relief sought but since the actions were for wrongful discharge it seems likely that the monetary damages sought at least partly represented wages lost as a result of the employer's actions.

This is supported by the Fifth Circuit's statement in Cox that plaintiff "seeks only monetary damages from each defendant, not arbitration or judicially-decreed reinstatement, remedies equitable in nature because they are in effect specific performance." 607 F.2d at 142. The court did not mention back pay or lost wages among the "remedies equitable in nature," nor is back pay a type of specific performance. Back pay represents wages plaintiff was deprived of the opportunity to earn, not money he actually worked for that was withheld from him. Therefore the



monetary recompense the Fifth Circuit called "the traditional common law remedy" probably included lost wages.

Similarly, in Minnis the plaintiff sought "a traditional legal remedy--compensatory and punitive damages." 531 F.2d at 852. Again in a discharge suit the plaintiff is unlikely to seek solely compensatory damages other than the back pay he was prevented from earning.

Even if the rulings in Cox and Minnis in favor of jury trials are called into question in light of Mitchell and DelCostello, because the former were based in part or treating the claims like common law contract or tort actions, the courts' classification of remedies has not been contravened. Absent contrary precedent regarding Section 301 and in light of both the availability of other legal relief under that section and the varying

treatment of back pay under other sections in the past, the court is persuaded that classification as legal relief is proper.[6]

Plaintiffs also seek reimbursement for medical expenses incurred at a time when, but for the union's alleged breach, they would have been employed, and McLean's health plan would have covered the cost. Such claims are comparable to lost wages, and are entitled to the same treatment.

Finally, Plaintiffs seek damages for mental and emotional distress, which is clearly legal relief. Therefore this action differs from those in which courts have denied jury requests because plaintiff sought only equitable relief. See, e.g., Griffin v. United States Postal Service, 635 F. Supp. 190, 193 (N.D. Ga. 1986); Spicuzza v. Ace Hardware Corp., No. C 82-1

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[6]Where the issue is unclear it should be resolved in favor of constitutionally protected rights.



(N.D. Ohio Jan. 15 1986).

In the alternative, Defendant also argues that the Supreme Court has treated Section 301/fair representation suits as predominantly equitable. Defendant refers to statements in both DelCostello and Mitchell that these suits are more analogous to actions to vacate arbitration decisions than they are to straight contract claims seeking damages. Mitchell, 451 U.S. at 62; DelCostello, 462 U.S. at 165. Defendant uses the Supreme Court's stated rationale, that the first step in Plaintiffs' claim involves the challenge to the finality of the arbitration ruling, to conclude that even if Plaintiffs state a claim for legal relief, that claim is secondary and incidental to the equitable relief of over-turning a prior decision.

Defendant also cites to the court two district court cases decided since

DelCostello which rely on such reasoning in granting the defendant's motion to strike plaintiffs' jury demand. Spicher v. Wilson Foods Corp., No. 85-1203, slip op. at 6 (C.D. Ill. Nov. 27, 1985); Harris v. Refiner's Transp. & Terminal Corp., No. C 84-7578, slip op. at 14 (N.D. Ohio Apr. 8, 1985). These cases conclude that "[b]ecause plaintiff is entitled to no relief unless the finality accorded the grievance process is set aside, the monetary request is . . . merely incidental to the primary relief sought." Harris, supra, at 14; see also Spicher, supra, at 6.

These cases overstate the Supreme Court's position. Both Mitchell and DelCostello involved the proper statute of limitations for filing a Section 301/fair representation claim. The court first decided in Mitchell that insofar as the



plaintiff's suit challenged the prior arbitration decision the three-month limitations period applicable to appeal of arbitration awards under state law was more appropriate than the six-year statute of limitations applicable to standard contract actions. 451 U.S. at 64. Then, in DelCostello, the Court held that neither option was suitable for Section 301/fair representation claims. Although such actions are more similar to challenges of commercial arbitration awards than to simple contract claims, the fact that the employee-plaintiffs are removed from the arbitration process requires that they be given more time after the award to vindicate their rights, 462 U.S. at 165-66.[7]

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[7]The DelCostello Court adopted the six-month period applicable to unfair labor practice actions brought before the National Labor Relations Board. While the Court considered fair representation

The Supreme Court's concern in both cases was the finality of arbitration decisions, not the applicability of the seventh amendment. The issue the Court faced was whether to allow a plaintiff to challenge the arbitration decision, not whether such challenge can be made before a jury. In the present case Plaintiffs filed this suit within the appropriate limitations period and their claims will be heard. The only question currently before this court is whether Plaintiffs are entitled to make their arguments to a jury, and on this point the Supreme Court has not spoken.

At least one circuit court agrees with

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actions to be closely related to unfair labor practice actions for this purpose, the Court expressly refrained from holding that they are equivalent. 462 U.S. at 170. Defendant's contention that, because unfair labor practice claims are not tried to a jury, the plaintiffs' claim should not be, is unpersuasive.



this analysis. In Quinn v. DiGiulian, supra, the Circuit Court of Appeals for the District of Columbia Circuit said that the DelCostello holding regarding statutes of limitations "offers little support for the . . . argument that [a fair representation] action is equitable in nature for seventh amendment purposes." 739 F.2d at 646.[8]

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[8]The court in Quinn went on to find that plaintiff's "action for damages for breach of the duty of fair representation is an action to enforce a legal right, and the plaintiff is entitled to a jury trial of that action." 739 F.2d at 646. Quinn involved only a fair representation claim, and not a hybrid Section 301, but two district courts have applied the holding in Quinn to a hybrid in ruling in favor of a jury trial. Cook v. National Maritime Union of America, 617 F. Supp. 1052 (S.D.N.Y. 1985); Emerick v. McConway & Torley Corp., 650 F. Supp. 545 (E.D. Pa. 1986); see also Grider v. Monin, 637 F. Supp. 324 (M.D. Tenn. 1986). The court finds the Quinn reasoning more convincing than the arguments in the cases offered by Defendant. Compare Spicuzza v. Ace Hardware Corp., No. C 82-1 (N.D. Ohio Jan. 15, 1986); Hampton v. Robertshaw Controls Co., Civ. 3-87-002 (E.D. Tenn. Apr. 23, 1987); McIntyre v. United Steelworkers of America, No. 85-258-Civ-3-16 (M.D. Fla. July 31, 1985).

Interestingly, Judge Contie's concurrence in Wood v. Teamsters Local 406, to which Defendant refers the court, also comments that Mitchell and DelCostello do not apply directly to the jury question in hybrid Section 301 claims. Nos. 85-1880/1963/1964, slip. op. at 22, n.1 (6th Cir. Dec. 15, 1986) (Contie, J., concurring). Judge Contie also contends that the underlying contract claim is triable to a jury, but the breach of duty of fair representation claim is not because it amount to an attempt to set aside the arbitration process. Therefore, the fair representation claim should be heard by the court before empanelling a jury. Id. In so arguing, Judge Contie essentially disregards the Court's holdings in DelCostello and Mitchell, with respect to treating the underlying claims as interdependent, and his position is



inconsistent with Defendant's contentions. Further, since the other two judges in Wood did not reach the jury issue, Id. at 19, n.3, the case provides no support for the Defendant's position.

This court in any event rejects the argument that Plaintiffs' damage claims against the union are incidental to the equitable objective of setting aside the arbitration decision. Plaintiffs' goal is not to overturn the Joint Bi-State Grievance Committee's arbitration ruling, and in light of McLean's present condition they certainly do not want another crack at arbitration. What Plaintiffs do want now is money to replace what they believe they lost because of the wrongdoing of their employer and their union, Local 391. Although to prevail Plaintiffs need to prove both the breach of contract and Local 391's breach of duty, if they do in fact

recover against the union it will be because Local 391 violated its duty, and not because the arbitration committee ruled incorrectly. Just as if the committee decided properly that McLean did not breach the contract, Local 391 would not be liable regardless of its conduct during the hearing, so also is Local 391 not liable regardless of the correctness of the arbitration ruling if the union represented the Plaintiffs fairly. See Bygott v. Leaseway Transp. Corp., 56 U.S.L.W. 2038 (3d Cir. June 25, 1987). Thus Plaintiffs' claim against the union for damages attributable to the breach of duty is no more incidental than their challenge of the arbitration committee's decision that McLean had not violated the agreement.

Moreover, even if the legal remedies sought were classified as "incidental" to the equitable relief, the Plaintiffs would



still be entitled to a jury determination of their legal claims. Dairy Queen, Inc. v. Wood, 369 U.S. 469, 473 (1962), citing Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 504, 510 (1959); Curtis, 415 U.S. at 196 n.11; Ross, 396 U.S. at 536-37.

Insofar as Plaintiffs' claim for lost wages and medical expenses constitute pleas for legal relief, and in light of Plaintiffs' mental and emotional distress claims, the second Ross standard counsels in favor of a jury trial of those issues.

Finally, although the practical abilities and limitations of a jury may be tested in this case, none of the courts which have commented on the third Ross standard have found the jury incapable of handling the suit, including all of the cases offered by Defendant. See, e.g., Spicher, supra, slip op. at 7; Kinzel, 88 F.R.D. at 364. The courts in both Curtis

and Quinn have noted the possibility of jury prejudice, however, and suggest that trial courts bear in mind their authority to grant directed verdicts and judgments notwithstanding the verdict. Curtis, 415 U.S. at 198; Quinn, 739 F.2d at 646.

Because Plaintiffs assert legal rights and seek legal remedies the seventh amendment grants them the right to a jury trial and Defendant's motion is denied.

In order to make the case more manageable for the jury, the court will bifurcate the action. Trial will proceed before the jury on the liability issue first, and if Defendant is found liable the court will then hold a separate trial on the issue of damages. Plaintiffs are entitled to have the same jury hear both the liability and damage issues.



An order consistent with this opinion will be filed contemporaneously herewith.

/s/ Frank W. Bullock, Jr.
United States District Judge

November 10, 1987

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
[FILED Dec 17 1987]
No. 87-8117

THOMAS C. TERRY; DAN FIELDS; JIM CROWE; KEITH BARKER; JAMES A. RICHARDS; DON WRIGHT; DAVID L. GILTZ; DALE BISHOP; TONY BAITY; DON BRITT; LONNIE DAVIS; JIM WILSON; DAVID C. KING; DONALD E. HENDERSON; ARTHUR JARRELL; RON RAY; J. C. GREER; GARY PEEBLES; HAROLD DYSON; ED STRANGE; SAM E. CALLAHAN; GEORGE C. BLANKENSHIP, JR; PAUL EMBRY; CLAYTON WORLEY; JOHN R. MARSHAL; ROBERT C. MUNSEY

Plaintiffs-Appellees

v.

CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL 391; and MCLEAN TRUCKING COMPANY, INC.

Defendants-Appellants

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Appeal from the United States District Court
for the
Middle District of North Carolina
at Winston-Salem

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Upon consideration of the petition for permission to appeal and interlocutory order, pursuant to 28 U.S.C. 1292(b),

IT IS ORDERED that the petition for permission to appeal is granted.

/s/ John M. Greacen
Clerk



UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 87-3896

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THOMAS C. TERRY; D. B. FIELDS; JIM CROWE; KEITH BARKER; JAMES A. RICHARDS; DON WRIGHT; DAVID L. GILTZ; DALE BISHOP; TONY BAITY; JAMES R. DAVIS; DON BRITT; LONNIE DAVIS; JIM WILSON; DAVID C. KING; DONALD E. HENDERSON; ARTHUR JARRELL; RON RAY; J. C. GREER; GARY PEEBLES; HAROLD DYSON; ED STRANGE; SAM E. CALLAHAN; GEORGE C. BLANKENSHIP, JR.; PAUL EMBRY; CLAYTON WORLEY; JOHN R. MARSHAL; ROBERT C. MUNSEY

Plaintiffs-Appellees

v.

CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL 391; McLEAN TRUCKING COMPANY

Defendants-Appellants

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Appeal from the United States District Court for the Middle District of North Carolina, at Winston-Salem. Frank W. Bullock, Jr., United States District Judge. (CA-83-693).

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Argued: Oct. 4, 1988 Decided: Dec. 20, 1988

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Before SPROUSE, ERVIN and WILKINS, Circuit Judges

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John David James (SMITH, PATTERSON, FOLLIN, CURTIS, JAMES & HARKAVY on brief) for Appellant. Robert Mauldin Elliot (PFEFFERKORN, PISHKO & ELLIOT, P.A. on brief) for Appellees.

SPROUSE, Circuit Judge:

This is an interlocutory appeal by the Chauffeurs, Teamsters & Helpers, Local 391 ("the Union") from the district court's order refusing to strike the jury trial demand of the plaintiffs, Thomas C. Terry and twenty-six other truck drivers (hereinafter "Terry"), holding that Terry was entitled under the seventh amendment to the United States Constitution to a jury trial of his hybrid § 301/duty of fair representation action, see Vaca v. Sipes, 386 U.S. 171 (1967), against his employer and the Union.[1] Terry v. Chauffeurs,

[1]The complaint also named the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and Terry's employer, McLean Trucking Company, Inc., as defendants. The



Teamsters & Helpers, Local 391, 676 F.Supp. 659 (M.D.N.C. 1987). The district court certified its ruling under 38 U.S.C. § 1292(b), and we granted the Union's petition for an interlocutory appeal to consider this single issue.

The plaintiffs were all drivers employed by McLean Trucking Co., Inc. and living in locations other than Winston-Salem, North Carolina. They successfully "bid" on driver vacancies stated by McLean to exist in its Winston-Salem terminal but, after moving to that area, were alternatively employed and laid off. In his complaint, Terry alleges that McLean breached its collective bargaining agreement by manipulating recall procedures so as to give other drivers preferences over

district court granted the international union's motion for summary judgment. McLean has since filed a petition in bankruptcy, and Terry's action against it has been stayed.

him. He complains that he consequently sustained substantial loss of wages. He also alleges that the Union failed to fairly represent him in the grievance proceedings he pursued to rectify McLean's breach.

The Union presented Terry's grievances to the Eastern Conference Joint Area Committee, which had been created by the collective bargaining agreement between McLean and the Union. That Committee ordered McLean to adjust its layoff policy to comply with a Change in Operation Plan previously agreed upon between McLean and the Union. Terry claims that McLean thereafter engaged in a pattern of layoff and recall in order to circumvent this ruling, and he filed a second grievance, this time with the Joint Bi-State Grievance Committee. It was denied. Terry contends that the Union conspired with McLean and



acquiesced in its violation of his rights and in other ways breached its duty of fair representation in the grievance proceedings.

In his complaint filed in the district court, Terry first demanded a declaratory judgment that McLean and the Union acted unlawfully and violated his rights under the law and under the collective bargaining agreement. He also demanded a permanent injunction ending the alleged violations and directing McLean to place him in his proper seniority position. In addition, he requested compensatory and punitive damages, attorneys' fees, and costs.

I

General seventh amendment jurisprudence is well-settled. Thus, only a brief summary is necessary to consider its application to the hybrid § 301/duty of fair representation action.

The seventh amendment to the Constitution of the United States provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

The Supreme Court, of course, has long recognized that the protection provided by this language extends well beyond the common-law forms of action existing in 1791. Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 447 (1830). Briefly stated, the Court in Parsons held that the seventh amendment applies in all suits which are in the nature of a suit at common law. Any uncertainty concerning the application of the rule to "mixed" suits of law and equity was resolved by Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959), decided after the merger of law and equity in the Federal Rules of Civil Procedure. See Fed.



R. Civ. P. 2; see also Rules Enabling Act of 1934, ch. 651 § 2, 48 Stat. 1064. The Court there held "that only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims." 359 U.S. at 510-11 (footnote omitted). It therefore required that in "mixed" cases, in the absence of irreparable harm to the plaintiff seeking equitable relief, the legal issues should be tried to a jury before the court ruled on equitable claims. Id. at 506-07, 510.

Since Beacon Theatres, the Court has reemphasized that the presence of an equitable claim or a request for an equitable remedy should not prevent legal issues or remedies from going to a jury. In Dairy Queen, Inc. v. Wood, 369 U.S. 469

(1962), the Court made clear that a trial court must independently determine whether the essential nature of the claim for relief was legal or equitable regardless of the "choice of words used in the pleadings." Id. at 478. In Ross v. Bernhard, 396 U.S. 531 (1970), the Court divided an action which traditionally was primarily equitable into its legal and equitable components. In that shareholder's derivative action, the Court held:

> where equitable and legal claims are joined in the same action, there is a right to jury trial on the legal claims which must not be infringed either by trying the legal issues as incidental to the equitable ones or by a court trial of a common issue existing between the claims. The Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action.

Id. at 537-38. The Court in Ross formulated a test for determining the legal nature of an issue which required the lower court to consider "first, the pre-merger



custom with reference to such questions; second, the remedy sought; and, third, the practical abilities and limitations of juries." Id. at 538 n. 10.

The Court also applied this constitutionally mandated preference for jury trial in the context of rights created by statute. In Curtis v. Loether, 415 U.S. 189 (1974), it stated:

> when Congress provides for enforcement of statutory rights in an ordinary civil action in the district courts, where there is obviously no functional justification for denying the jury trial right, a jury trial must be available if the action involves rights and remedies of the sort typically enforced in an action at law.

Id. at 195.

II

The Union contends that only equitable issues are presented in this hybrid § 301/duty of fair representation case, and, therefore, Terry has no constitutional right to a trial by jury. In support of

this contention, the Union argues because the Supreme Court in United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 (1981), and DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983), stated that there was no precise analogy to the hybrid action in the common law, the action must be considered essentially equitable in nature. Terry, however, stresses the second factor of the Ross test and urges that the issues framing the action and the remedies flowing from them vel non must be examined individually in determining whether the underlying issues are legal or equitable--that "[t]he Seventh Amendment protection depends on the nature of the issue to be tried rather than the character of the overall action." Ross, 396 U.S. at 538.

In both Mitchell and DelCostello, the Court faced the problem of which statute of



limitations applied to hybrid § 301/duty of fair representation actions. In Mitchell, the Court considered the choice of New York's ninety-day limit for challenging an arbitration decision or its six-year limit for breach of contract actions. In rejecting the six-year period, the Court noted that an "indispensable predicate" for a hybrid action was a demonstration that the union had breached its duty of fair representation in the grievance or arbitration hearing. 451 U.S. at 62. Only on such a showing could the otherwise final and binding arbitration decision be set aside and the issue of the breach of a collective bargaining agreement be reopened and tried in the courts. Therefore, finding that these peculiar requirements of a hybrid action made the claim "more a creature of 'labor law' ... than ... of general contract law" and that labor policy

required a "'relatively rapid disposition of labor disputes,'" the Court chose to borrow the shorter period provided by New York's arbitration statute of limitations. Id. at 63.

In DelCostello, the Court reconsidered the rationale underlying the application of the statute of limitations to a hybrid § 301/duty of fair representation action. It said:

> Such a suit, as a formal matter, comprises two causes of action. The suit against the employer rests on § 301, since the employee is alleging a breach of the collective bargaining agreement. The suit against the Union is one for breach of the Union's duty of fair representation, which is implied under the scheme of the National Labor Relations Act. "Yet the two claims are inextricably interdependent." ... Mitchell [451 U.S.] at 66-67 (Stewart, J., concurring in judgment) ... [Such an action] has no close analogy in ordinary state law. The analogies suggested in Mitchell both suffer from flaws, not only of legal substance, but more important, of practical application in view of the policies of federal labor law and the practicalities of hybrid § 301/fair



representation litigation.

462 U.S. at 164-65 (footnote omitted).

While continuing to hold that the hybrid action was closer to an action to vacate an arbitration decision than to a breach of contract action, the Court in DelCostello recognized that this analogy too was imperfect and noted that for practical reasons the state limitations periods for challenging arbitration decisions were too short and "fail to provide an aggrieved employee with a satisfactory opportunity to vindicate his rights." Id. at 166. It noted that "the closest state-law analogy" was a legal malpractice action, as if the union were "a lawyer who mishandles a commercial arbitration." Id. at 167.

The Court decided, however, that the malpractice analogy was not responsive to policies underlying the application of

statutes of limitations in this labor-law context. It reasoned that under Vaca v. Sipes, 386 U.S. 171 (1967), and Bowen v. United Parcel Service, 459 U.S. 212 (1983), the union was only responsible for increases in a plaintiff's damages caused by its breach of duty. Thus, a malpractice statute of limitations would only provide that greater time period for the union's portion of the damages. The employer, protected by the short limitations period designed for challenges to arbitration decisions, might escape responsibility for its large portion of the damages unless the employee managed to file his claim within that short period. Finally, finding no adequate analogy in state law, the Court resorted to the six-month period for making charges of unfair labor practices under § 10(b) of the National Labor Relations Act as the closest and most just analogy.



In Quinn v. DiGiulian, 739 F.2d 637 (D.C. Cir. 1984), the D.C. Circuit held that DelCostello had no application to an issue of the right to trial by jury. In its view, the Supreme Court's holding that the hybrid action had no close analogy to ordinary state tort or contract actions did not resolve the legal/equitable determination necessary for seventh amendment analysis. Further, the D.C. Circuit astutely observed that "the nature of the remedies authorized and sought has become a more reliable clue to whether the action is legal or equitable in nature than the existence of a precise common law analogy to the modern cause of action." id. at 646 (citing Curtis, 415 U.S. at 196-97). Contra Leach v. Pan American World Airways, 842 F.2d 285 (11th Cir. 1988) (holding that the DelCostello rationale foreclosed the seventh amendment issue).

Although analogies to state-law actions are helpful in seventh amendment analysis, the absence of a single clear analogy does not preclude a determination that a statutory action involves "rights and remedies of a sort typically enforced in an action at law." Curtis, 415 U.S. at 195. Beacon Theatres, Dairy Queen, and their progeny instructed the district courts to ensure that all issues of fact inherent in any legal claims be tried to a jury before the Court resolved any remaining factual issues raised by equitable claims. Ross and Curtis made clear that the nature of the claims and remedies determine whether a right to a jury trial is present, not the overall nature of the action.

Making a law/equity determination for seventh amendment purposes is a far different task than choosing a statute of



limitations in a labor-law context. While the hybrid action we consider is the same kind of action the Supreme Court considered in Mitchell and DelCostello, there is no need for us to treat the hybrid action as an indivisible whole when performing a seventh amendment analysis. Indeed, the Beacon Theatres line of cases instructs us to do just the opposite.

III

We do not think it practical to resolve the legal/equitable dichotomy in this labor-law context with a bright-line rule. As the Supreme Court cogently recognized in both Mitchell and DelCostello, actions to enforce rights under the Labor Management Relations Act (hereinafter "LMRA"), 29 U.S.C. § 141, et seq., and other labor-law statutes do not neatly fit any mold of traditional common-law actions. Therefore, we must analyze

the issues and remedies in each hybrid case.

Terry asks for declaratory judgment, injunctive relief, and monetary relief. The part of this action seeking injunctive relief against McLean has been mooted by McLean's bankruptcy. The questions of declaratory and injunctive relief against the Union, however, are still viable. The demand for injunctive relief raises equitable issues. Resolution of the declaratory relief demand, however, raises legal issues that may well require both a determination by the court of the meaning of the collective bargaining agreement and a resolution by the jury of disputed facts concerning whether that agreement was breached. Both the interpretative issues that the court must determine in this context and the factual issues that the fact finder must resolve relate to the



resolution of legal issues.

It is true that claims for back wages in other type actions have been characterized variously both as legal and equitable in nature.[2] If Congress had specifically classified backpay as an equitable remedy in the LMRA, there would be, of course, no jury trial right question. In enacting the

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[2] Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969) (cited with approval in Great American Federal Savings & Loan Ass'n v. Novotny, 442 U.S. 366, 375 (1979)) states that back pay in Title VII of the Civil Rights Act of 1964 cases is an equitable remedy. This holding, however, is based in large part on the specific language of Title VII, which expressly authorizes only equitable remedies. See 42 U.S.C. § 2000e-5(g). In Lorillard, Div. of Loew's Theatres, Inc. v. Pons, 434 U.S. 575, 584 (1978), however, the Supreme Court distinguished the Title VII cases from cases arising under the provisions of the Age Discrimination in Employment Act. 29 U.S.C. § 621, et seq. The latter statute specifically permits recovery of legal or equitable relief, 29 U.S.C. § 626(b), (c) (1985), and expressly incorporates the procedural aspects of the Fair Labor Standards Act, 29 U.S.C.A. §§ 216, 217 (1965 & West Supp. 1988) under which there is a right to a jury trial. See 434 U.S. at 580.

LMRA, however, Congress did not expressly provide for either legal or equitable relief, and backpay, as a form of money damages, may appropriately be considered legal in nature. Thus, although a § 301 action to remedy a violation of a collective bargaining agreement has no counterpart in common law, in our view, the claims for damages asserted here involve legal issues, and, like the Supreme Court in Curtis, we find no functional justification for denying the jury-trial right. See 415 U.S. at 195.

We review the duty of fair representation increment of the hybrid action in the same light. Like its § 301 sibling, it is derived from congressional enactment, albeit by judicial interpretation of the statute. See, e.g., Vaca, 386 U.S. at 177. Further in DelCostello, the Supreme Court noted that "the closest state-law analogy"



to this action is a state tort malpractice action. 462 U.S. at 167. In our view, this component of the action is also legal in nature.

As we have indicated, we are unable to structure a bright-line rule stating which specific issues in hybrid § 301/duty of fair representation cases are subject to the seventh amendment requirement of a jury trial. We hold instead that, although many aspects of this action are intertwined, presenting both equitable and legal issues, either party is entitled to a jury trial of identifiable legal issues. We think the dictates of Beacon Theatres, Dairy Queen, and Curtis require that result and that Mitchell and DelCostello did not sequester these hybrid cases from this general body of law.

There being both equitable and legal issues present in this case, the district

court correctly upheld Terry's right to a jury trial on the issues of declaratory judgment relief and damages. Its decision is therefore affirmed.

AFFIRMED.